United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

76-1579

To be argued by
HOWARD W. GOLDSTEIN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1579

UNITED STATES OF AMERICA,
Appellee,

—v.—

JOEL I. LEVINE,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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UNITED STATES OF AMERICA,

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—v.—

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Joel I. Levine appeals from a judgment of conviction entered on November 12, 1976, in the United States District Court for the Southern District of New York, after a six-day trial before the Honorable Charles E. Stewart, United States District Judge, and a jury.

Indictment S76 Cr. 452, filed on September 27, 1976 * charged Levine with (1) mail fraud, in violation of Title 18, United States Code, Section 1341 (Count One); (2) use of a false name for the purpose of committing mail

* Indictment S.76 Cr. 452, filed on September 27, 1976, superseded Indictment S.76 Cr. 452, filed on May 4, 1976. The indictment filed in September differed from the earlier indictment in that (1) the credit application which formed the basis for Count Five was different and (2) the statutory citation for Count Seven, which charged Levine with bail jumping, was corrected. Levine's

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fraud, in violation of Title 18, United States Code, Section 1342 (Counts Two and Three); (3) making false statements to federally insured banks in credit and loan applications, in violation of Title 18, United States Code, Section 1014 (Counts Four through Six) and (4) bail jumping, in violation of Title 18, United States Code, Section 3150 (Count Seven).

Trial commenced on October 6, 1976. On October 14, 1976 the jury returned verdicts of not guilty on Count One and guilty on Counts Two through Seven.

On November 12, 1976, Judge Stewart sentenced Levine to concurrent terms of two years' imprisonment on Counts Four through Six and four years' imprisonment on Counts Two, Three and Seven. Levine is presently serving his sentence.

Statement of Facts

A. Levine's Counsel

Levine, whose sole issue on appeal concerns the alleged incompetence of his trial counsel, was represented by no fewer than five attorneys in the District Court proceedings and by two attorneys on this appeal. A brief history of Levine's relationship with his attorneys, which is essential to a complete understanding of his claim, is set forth here.

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claim that his trial counsel was derelict in failing to raise a claim of variance because of the improper citation (Brief p. 1) in the May indictment is, therefore, based on an erroneous understanding of the facts, as well as being frivolous as a matter of law. See, *e.g. United States* v. *Chestnut*, 533 F.2d 40, 45 (2d Cir.), *cert. denied*, 97 S. Ct. 88 (Oct. 4, 1976); *United States* v. *Calabro*, 467 F.2d 973, 981 (2d Cir. 1972), *cert. denied*, 410 U.S. 926 (1973); *United States* v. *Galgano*, 281 F.2d 908, 911 (2d Cir. 1960), *cert. denied*, 366 U.S. 960 (1961).

Levine was initially arrested on July 8, 1975, and arraigned before the Honorable Sol Schreiber, United States Magistrate, Southern District of New York. At that time, Jack Lipson, Esq., of the Legal Aid Society, Federal Defender Services Unit, was assigned to represent Levine.

On July 14, 1975, Lawrence P. Zamzok, Esq., who had been retained by Levine, entered a notice of appearance on his behalf despite Levine's prior claim of indigency and entitlement to appointment of counsel under the Criminal Justice Act. On December 8, 1975, Mr. Zamzok, who had been unable to locate Mr. Levine, was relieved as counsel on his own application. (Tr. 362-64).*

A bench warrant was issued on December 8, 1975, when Levine failed to appear to plead to Indictment 75 Cr. 1151, filed on November 25, 1975.** Levine was arrested on March 25, 1976. At that time, David Blackstone, Esq. was appointed to represent Levine. On April 23, 1976, Mr. Blackstone's request to be relieved as counsel was granted by Judge Stewart.***

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* The abbreviation "Tr." refers to the trial transcript; "GX" refers to Government Exhibits; "App." refers to the defendant's appendix; "Br." refers to the defendant's brief on appeal.

Zamzok testified that Levine filed a complaint with the Grievance Committee of the bar association against his firm. The substance of that complaint was not revealed. (Tr. 364).

** Indictment 75 Cr. 1151 was superseded by S. 76 Cr. 452, filed on May 4, 1976.

*** On April 23, 1976, Levine appeared before a grand jury to provide handwriting exemplars. Mr. Blackstone was outside the grand jury room as counsel to Levine. Levine refused to provide the handwriting exemplar, stating that he had fired Mr. Blackstone and wanted another lawyer. At a conference before Judge Stewart that same day, Levine accused Mr. Blackstone of "lack of interest in the case" and stated that Mr. Blackstone had asked him for permission to be relieved as his counsel on April 22, 1976. Blackstone vehemently denied telling Levine he wished

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Levine's next lawyer was Robert Mitchell, Esq. On July 9, 1976, the Government reported to the court facts that led it to conclude Levine had fled, or was preparing to flee, the jurisdiction. Mr. Mitchell reported that his constant efforts to contact the defendant had proven fruitless. (Tr. Oct. 1, 1976, p. 16). A bench warrant was issued. (App. A, p. 2).

On July 12, 1976, Levine was arrested on the bench warrant and Mr. Mitchell was relieved as counsel after John C. Hill, Esq. appeared for Levine as retained counsel. (App. A, p. 2). Mr. Hill made several successful applications to reduce Levine's bail and represented him at trial.*

On December 3, 1976, Levine's motion requesting that Mr. Hill be relieved as counsel on appeal was granted and The Legal Aid Society, Federal Defender Services Unit, was appointed as appellate counsel.

The Legal Aid Society asked to be relieved as appellate counsel on January 14, 1977, because of disagreements with Levine. By order dated February 8, 1977, Henry Putzel, III, Esq. was appointed to represent Levine on this appeal.

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to be relieved. (Transcript of pre-trial conference, April 23, 1976, p. 4). Levine later told Judge Stewart "Mr. Blackstone asked to be relieved because there was a conspiracy going on between him and [Assistant United States Attorney] Goldstein when I was taken to the grand jury." (Transcript of pre-trial conference, October 1, 1976, p. 15, hereinafter "Tr., Oct. 1, 1976").

* On October 1, 1976, four days before the scheduled start of the trial, but weeks after he had retained Mr. Hill, Levine asked the court to relieve Mr. Hill, stating that Mr. Hill was not prepared to defend him. Levine's request was denied. (Tr. Oct. 1, 1976).

B. The Governments Case

1. Synopsis

During the period November 18, 1974, to March 25, 1976, Joel I. Levine devised and executed a scheme to defraud banks, commercial credit companies and retail stores by adopting fictitious identities and submitting applications for loans, credit cards and charge accounts to those institutions. Levine rented several apartments and office space and made use of a telephone answering service to provide the various companies with some degree of corroboration for the information used in the various applications.*

The Government's case consisted of the testimony of twenty-eight witnesses and some 22 documentary exhibits.

The defense case consisted of two documentary exhibits. Levine quite properly does not raise any issue with respect to the sufficiency of the evidence to support his conviction.

2. The Proof at Trial

The proof at trial established that from November 8, 1974 to March 25, 1976, Levine posed as five separate individuals, each with a different personal background and employment history. Those identities were used on separate, fraudulent credit card and loan applications.

a) Count Four

Count Four of the indictment charged that Levine falsely stated his name was Peter Cole and that he had

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* The apartments and office space were occupied for brief periods of time and then abandoned. See pp. 9, 11-12, *infra*.

been employed for five years by the International Law and Tax Haven Review, 3 West 83rd Street, New York, New York, in applying for a regular checking account and $2500 line of credit with The Bankers Trust Company. ("Bankers Trust"), a federally insured bank.

On March 24, 1975, Joel Levine entered the Lincoln Square Branch of Bankers Trust, identified himself to the assistant manager, Caroline Tomlinson, as Peter Cole, told her he was employed by the International Law and Tax Haven Review, 3 West 83rd Street, New York, New York and asked to open a checking account. Using the information supplied by Levine, Ms. Tomlinson filled out a new account application and signature cards * (GX 1) and opened an account for Levine in the name of Peter Cole. Because Levine did not have any identification in the name of Peter Cole, Ms. Tomlinson did not give him any checks. (Tr. 37, 40-41, 71).**

Having failed to obtain checks from Ms. Tomlinson, Levine, again posing as Peter Cole, went to the Bankers Trust branch at 23rd Street and Third Avenue on May 29, 1975 and asked to have his Lincoln Square account transferred to that branch. He also asked to establish a $2500 "advance checking" credit line (Tr. 106-108).*** Levine was given an application for a checking account and for an advance checking credit line by Janet Sweeney, a Bankers Trust customer representative, completed the

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* Levine signed the signature cards. (Tr. 39).

** In a subsequent telephone conversation with "Cole", Tomlinson asked him to come to the bank with his identification so she could give him checks. Cole agreed to furnish identification, but never did so. (Tr. 40-41).

*** "Advance checking" is a service offered by Bankers Trust which allows a customer to overdraw his checking account up to a given amount. The amount of the overdraft is a loan to the customer. (Tr. 86).

application (GX 3) and signed it. The application was made out in the name of Peter Cole, listed Cole's home address as 370 E. 76th Street, Apartment 4D, New York, New York and listed his employment as marketing vice president for five years at a salary of $65,000 for the International Law and Tax Haven Review, 3 West 83rd Street, New York, New York.* Sometime after Levine filled out the "Peter Cole" advance checking application, he returned to the bank. Despite the fact that the account transfer had not yet been approved, Mrs. Sweeney, relying on the fact that the advance checking credit line had been approved, gave Levine a book of checks (Tr. 111). The bank suffered a $2475 loss on the account. (Tr. 48).

In addition to proving that Levine used a false name, *i.e.*, Peter Cole, on the May 29, 1975 credit application,** the Government proved, through numerous witnesses, that the other information given by Levine to Bankers Trust was false. Thus, the evidence showed that there was no Peter Cole living at 370 East 76th Street during the period 1972-1975 and, indeed, that the building did not even have an apartment 4D. (Tr. 143-146); that Levine was looking for a job in August, 1974 (Tr. 150-54, 162)*** and that Levine was living at 3 West 83rd Street during the Christmas season of 1974. (Tr. 163-64).

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* GX 3 was the application on which Count Four of the indictment was based.

** A postal forwarding card (GX 11), requested that mail directed to Peter Cole at 370 E. 76th Street be forwarded to J. Levine at 3 W. 83rd Street. (Tr. 207-11). The latter address was one at which the defendant Levine briefly occupied an apartment (Tr. 300).

*** Levine subsequently found work as an insurance salesman from October 31, 1974, until February 1, 1975. (Tr. 160; GX 7). In applying for the salesman's job, Levine did not list as a reference the International Law and Tax Haven Review where he, as Peter Cole, allegedly had worked for five years, *i.e.* since 1970 (GX 6).

Finally, the three principals of the International Tax Haven Review, Inc. ("the Review")—Roy Comart, Robert Koppelman and Melvin Stein—testified that the Review was incorporated in October 1974 (Tr. 173, 248, 268; GX 9A, 9B); that the Review was located at 60 Sutton Place South in New York City (Tr. 174, 250); that Levine worked for the Review from November 1974 until January or February 1975 (Tr. 175, 250, 270-71) when the Review was dissolved and it was discovered that Levine had been engaging in business from his home address and using the Review's name without authority (Tr. 251, 273-74); that Levine never received a salary from the Review (175, 251, 274) and that Levine was never a vice-president of the Review (Tr. 252).*

b) Count Six

Count Six of the indictment charged Levine with falsely stating that he had been employed for a period of two years by P. & R. Electric Corp., 58-37 Francis Lewis Boulevard, Hollis, New York, in applying for an installment loan of $1500 from the Chemical Bank. The application which formed the basis for Count Six listed Levine's address as 3 West 83rd Street, Apartment 1B, New York, New York and stated that Levine had been employed for two years as a salesman for P. & R. Electric Corp., 58-37 Francis Lewis Boulevard, Hollis, New York at an annual salary of $15,000. (Tr. 374; GX 20).

The Government connected the loan application to the defendant Levine through the testimony of several wit-

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* The business telephone numbers for the International Law and Tax Haven Review listed on the Bankers Trust "Peter Cole" application (GX 3) were connected to the Federated Answering Service in March 1975 at the request of a Joel Levine of 3 West 83rd Street, New York, New York. (Tr. 138-39; GX 10).

nesses. Naftali Koch, testified that his realty company —Naftalco Realty Corp.—operates 3 West 83rd Street, New York, New York, and that he showed the defendant Levine a studio apartment (Apartment 1B) at 3 West 83rd Street on September 15, 1974. Levine completed an application (GX 12) on that same day and signed a two-year lease (GX 12A) on September 19, 1974. (Tr. 288-94). After Levine failed to pay the rent in July 1975 and after mail began to accumulate in front of Levine's door (Tr. 295-296), Mr. Koch and the building superintendent entered the apartment and discovered that it had been abandoned. (Tr. 298-300). Inside the studio apartment, which was approximately 14 feet by 16 feet (Tr. 304), Koch noticed five telephones. (Tr. 298-99).*

Joseph McNally, a handwriting expert, testified that in his opinion the signature "Joel Levine" on the Chemical Bank instalment loan application (GX 20) was made by the same person who signed "Joel Levine" to a list of references submitted in connection with an application for a job as a life insurance salesman (GX 6)** and that the printing on the loan application (GX 20) was made by the same person who printed the information on the "Peter Cole" Bankers Trust application. (GX 3).***

Finally, Robert Koppelman **** both connected the Chemical loan application to Levine and proved the falsity

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* The home telephone number listed on the Chemical Bank instalment loan application (1877-3955), was connected to the Federated Answering Service on October 31, 1974 at the request of a Joel Levine. (Tr. 138; GX 10).

** That person was identified as the defendant Levine. (Tr. 154-55).

*** That person was identified as the defendant Levine. (Tr. 107-108).

**** This was the same Robert Koppelman who had been involved in the International Tax Haven Review, *supra*, p. 8.

of the employment information contained in that application. Koppelman testified that he was the president of P. & R. Electric Corp. and had been president of the company for the past four years. (Tr. 166). Koppelman met Levine in the summer of 1973 and thereafter he and Levine became social friends. (Tr. 167). In September or October, 1974, Koppelman and Levine discussed the possibility of Levine working for P. & R. Electric Corp. as a salesman on a commission basis. (Tr. 168-69). Koppelman testified that Levine, however, never actually worked for P. & R. Electric Corp. (Tr. 169). The company's quarterly report of wages taxable under the Federal Insurance Contributions Act for the quarter ending December 31, 1974, did not list Joel Levine as an employee. (Tr. 170-71; GX 8).*

c) Count Three

Count Three of the indictment charged that for the purpose of executing his scheme to defraud, Levine used a fictitious name and address—Michael Goodman, 234 East 14th Street, New York, New York—in applying for an Exxon credit card through the United States mail. The credit card application, which was received by Exxon in the mail (Tr. 306-307; GX 18), listed Goodman's home address as 234 East 14th Street, New York, New York for a four year period and stated that Goodman had been employed for six years at a salary of $3000 per month as the sales manager for Cranes Unlimited, an industrial equipment firm located at 1182 Broadway, New York,

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* P. & R. Electric Corp. did issue a check, dated December 17, 1974, in the amount of $6000 to Joel Levine. That check (GX 9C) was an advance on sales commissions. The sales were never made. (Tr. 198-99).

New York. (GX 18).* The proof at trial established not only the use of that fictitious name and address by Levine, but the falsity of the employment information set forth on the credit card application.

Although he could not attribute the Goodman signature to Levine (Tr. 408-09), Joseph McNally concluded that the person who printed the Goodman application (GX 18) was the same person who printed the "Peter Cole" Bankers Trust application (GX 3). (Tr. 408-409, 426, 429). However, the Government had direct proof that Levine was Michael Goodman.

Nicholas Durso, the superintendent at 234 East 14th Street, New York, New York testified that on May 1, 1975 Levine, posing as Michael Goodman, rented apartment 1B at that address for a two year period.** After moving in, Levine told Durso he would be receiving mail for a friend. (Tr. 323-24).

Approximately three weeks after Levine moved into his apartment at 234 East 14th Street, Durso saw him removing his furniture from the building (Tr. 323). Two months later, the apartment was abandoned. (Tr. 324).***

The proof at trial also established that Cranes Unlimited, 1182 Broadway, New York, New York was nothing but a "mail drop" used by Levine. Joseph Caruana,

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* In response to the application, Exxon issued a credit card in Mr. Goodman's name (Tr. 307; GX 19) and mailed it to the 14th Street address (Tr. 307; GX 19A). The card was returned to Exxon by the postal service (Tr. 308).

** Durso identified the apartment application signed by Levine in the name of Michael Goodman (Tr. 321-22; GX 15).

*** At the time of the Exxon application, therefore, Levine or "Goodman" had been at the 14th Street address for approximately two weeks—not four years.

the superintendent of 1182 Broadway, an office building, testified that in the spring of 1975, he showed office space—Room 801—at that address to two men, who rented the space immediately. One of those men was Levine. (Tr. 309-10, 317). Sometime thereafter, Caruana received a nameplate for "Cranes Unlimited—Room 801" for the building's directory (Tr. 310-11; GX 33).

During the period Cranes Unlimited was in the building, Levine would come to the office a couple of days per week for approximately twenty minutes at a time. By the end of the summer of 1975, Levine, his companion and Cranes Unlimited had abandoned the office. (Tr. 312, 317).*

d) Counts Two and Five

Count Two of the indictment charged that for the purpose of executing his scheme to defraud, Levine used a fictitious name and address—Michael Goldstein, 234 East 14th Street, New York, New York—in applying through the mail for a Whitehouse and Hardy charge account.

Count Five of the indictment charged that Levine falsely stated that his name was Michael Goldstein and that he had been employed for six years by Cranes Unlimited, 1182 Broadway, New York, New York, in applying for a Chemical Bank privilege checking account credit line.

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* In the opinion of the handwriting expert, a postal forwarding card on which it was requested that mail directed to Michael Goodman at 234 E. 14th Street be forwarded to Cranes Unlimited at 1182 Broadway (Tr. 327-38; GX 16), was printed by the person who printed the "Peter Cole" Bankers Trust application (GX 3) (Tr. 408-409).

Employees of Whitehouse and Hardy and Chemical Bank identified the credit applications in the name of Michael Goldstein. (Tr. 377-79; GX 17; Tr. 368-69; GX 14, 14A).* Both applications listed Goldstein's home address as 234 East 14th Street, New York, New York for at least a two year period and stated that Goldstein had been employed for six years as vice-president of Cranes Unlimited, 1182 Broadway, New York, New York. Both applications gave "Carol" as the name of Goldstein's wife and listed the same home telephone number, business telephone number and social security number. (GX 14, 17). The Chemical application, which was dated approximately one month after the Whitehouse and Hardy application, listed the latter store as a credit reference. (GX 14).**

With respect to both the Whitehouse and Hardy and Chemical applications, the jury was entitled to infer from the testimony of Nicholas Durso, see p. 11, *supra* and Joseph Caruana, *see* pp. 11-12, *supra*, that Michael Goldstein was, in fact, the defendant Levine. In addition, Joseph McNally opined that both applications were printed by the same person who printed the "Peter Cole" Bankers Trust application (Tr. 408-409, 429).***

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* Neither employee identified Levine as Goldstein. The Whitehouse and Hardy application was received through the mail. (Tr. 379-80; GX 17).

** The Chemical application (GX 14) listed apartment 1B as Goldstein's apartment and gave an annual income of $60,000. No apartment number was listed on the Whitehouse and Hardy application (GX 17) and an income figure was not requested.

The Whitehouse and Hardy charge account and the Chemical credit line were both approved. Neither the store nor the bank suffered any loss (Tr. 370-71, 80).

*** Again, McNally could not identify the signatures on the applications with any exemplar of Levine's signature. (Tr. 409).

e) Count Seven

Count Seven of the indictment charged that Levine wilfully failed to appear before the United States Magistrate for the Southern District of New York as required after his release on bail.

Levine was initially arrested on July 8, 1975. Bail was fixed in the amount of $2500 cash or surety bond and Levine was required, as a condition of his release, to sign in Monday mornings before 10:30 A.M. at the office of the clerk for the United States Magistrate. (GX 23). On September 29, 1975, after Levine asked to have the sign-in requirement reduced to once every month, (GX 25), the Honorable Sol Schreiber, United States Magistrate, modified the bail conditions to require that Levine sign-in once every three weeks. (Tr. 361; GX 26). Levine was informed of this requirement by his attorney, Lawrence P. Zamzok, Esq. Levine signed in as required on September 29, 1975 and October 20, 1975.* Thereafter, he failed to appear. (GX 29). He was re-arrested on March 25, 1976. (Tr. 386).

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* Levine signed in weekly, as required, prior to September 29, 1975. (GX 29).

ARGUMENT

POINT I

Levine Was Not Deprived of the Effective Assistance of Counsel.

Faced with the prospect of an overwhelming Government case, Levine adopted throughout the proceedings the tactic of creating a record rife with allegations that his lawyer was both unprepared and incompetent. See *United States* v. *Birrell*, 286 F. Supp. 884 (S.D.N.Y. 1968). Each of those allegations was rejected by Judge Stewart, who in the midst of trial * responded to one of Levine's attacks by telling Mr. Hill:

> "Mr. Hill, I have not seen anything so far which indicates to me that you are not doing your job as well as it can be done." (Tr. 352).**

Given Levine's repeated allegations, and his history of being unable to maintain a harmonious, or even working, relationship with any of his counsel, see pp. 2-4, *supra*, it is not surprising that the sole claim Levine now makes on appeal is that he was deprived of the effective assistance of counsel. That claim is wholly without merit.

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* The entire colloquy took place outside the jury's presence.

** Judge Stewart's evaluation of Mr. Hill was repeated when Levine was sentenced:

> "One other thing, Mr. Levine. In connection with your motion for a new trial because of the conduct of your counsel, I didn't observe during the course of the trial any of the circumstances which you charge.
>
> * * * * *
>
> And I found that Mr. Hill conducted himself properly at the trial and did an adequate job, at least an adequate job, in representing you. (Tr. 560-61).

The standard adopted by this Court for evaluating whether a defendant has been deprived of the effective assistance of counsel has been long established and often repeated. To warrant reversal of Levine's conviction, the conduct of his counsel must have been "so 'woefully inadequate' as to shock the conscience of the Court and make the proceeding a farce and mockery of justice" *United States* v. *Yanishefsky*, 500 F.2d 1327, 1333 (2d Cir. 1974). *Accord, United States* v. *Taylor*, Dkt. No. 76-1210, slip op. 2805, 2829 (2d Cir., April 13, 1977); *Rickenbacker* v. *Warden*, 550 F.2d 62, 65 (2d Cir. 1976); *Lunz* v. *Henderson*, 533 F.2d 1322, 1327 (2d Cir. 1976), *cert. denied*, 97 S.Ct. 136 (Oct. 4, 1976); *United States* v. *Sanchez*, 483 F.2d 1052, 1057 (2d Cir. 1973), *cert. denied*, 415 U.S. 991 (1974); *United States* v. *Currier*, 405 F.2d 1039, 1043 (2d Cir.), *cert. denied*, 395 U.S. 914 (1969); *United States* v. *Garguilo*, 324 F.2d 795, 796 (2d Cir. 1963); *United States* v. *Wight*, 176 F.2d 376, 379 (2d Cir. 1949), *cert. denied*, 338 U.S. 950 (1950). The representation by defense counsel in this case was hardly of that nature.*

Levine cites several instances of his lawyer's conduct to demonstrate the alleged constitutional inadequacy of the representation rendered him. None of those in-

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* Levine understandably urges that this Court adopt the "reasonably competent assistance" standard of *United States* v. *DeCoster*, 487 F.2d 1197 (D.C. Cir. 1973). Whether this Court should adopt that standard is an issue that need not be resolved in this case for, as in *Rickenbacker* v. *Warden*, *supra*, 550 F.2d at 66, counsel's performance in this case was competent under any of the standards currently applied. For that reason, remand for an evidentiary hearing to determine what efforts counsel made to prepare for trial would also serve no useful purpose. See *United States* v. *Yanishefsky*, *supra*, 500 F.2d at 1334. In addition, the *DeCoster* opinion was recently withdrawn by the District of Columbia Circuit Court, and will be reheard *en banc*.

stances, taken either singly or cumulatively, demonstrates anything other than Levine's dissatisfaction with the ultimate result of his trial.

Levine first challenges counsel's failure to request particulars and pre-trial discovery from the Government. However, the indictment in this case apprised the defendant in detail of the facts of the crimes with which he was charged and the Government furnished defense counsel with copies of the credit applications on which the various counts were based. (Tr. 354-55). In addition, the Government orally outlined its entire case to Levine's counsel prior to trial. (Tr. 354-55; Tr. Oct. 1, 1976 pp. 9-10).*

Levine was not entitled to particulars beyond those furnished by the Government. *See e.g. United States* v. *Salazar*, 485 F.2d 1272, 1278 (2d Cir. 1973), *cert. denied*, 415 U.S. 985 (1974); *United States* v. *Lebron*, 222 F.2d 531, 535-36 (2d Cir.), *cert. denied*, 350 U.S. 876 (1955). Nor was there a necessity for formal motions in view of the extensive discovery afforded defendant.** As such, Levine's complaint that his lawyer failed to make such motions is without merit.*** *See e.g. United States* v. *Sanchez*, *supra*, 483 F.2d at 1057; *United States* v. *Birrell*, *supra*, 286 F. Supp. at 894.

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* After meeting with the Government, Levine's counsel apparently re-evaluated Levine's prospects for prevailing on the merits and communicated that re-evaluation to his client. Levine's dissatisfaction with counsel, who had been acting on his behalf since July 12, 1976, manifested itself immediately thereafter. (Tr. Oct. 1, 1976, pp. 3-4).

** Levine also complains of counsel's failure to obtain the report of the Government's handwriting expert prior to the commencement of trial on October 6, 1976. The expert's two page report, dated October 5, 1976, was furnished to counsel on October 8, 1976—four days before the expert testified. (Court's Exhibit 1).

*** Counsel's failure to move to suppress the in-court identifications of Levine by witnesses who had been shown photographs is discussed *infra*.

Second, with respect to trial preparation, Levine's complaint that his counsel failed to subpoena defense witnesses or prepare a defense case is largely a repetition of an unsubstantiated claim made by Levine to the court during the trial. At that time, Levine alleged that counsel was refusing to subpoena various documents. The only documents mentioned to the Court by Levine were patently irrelevant to the issues at the trial.* While Levine spoke of other unspecified "certified" documents that he wanted introduced on his behalf, he was unable to describe or furnish them to the court when requested to do so. (Tr. 344-55).

Levine next complains about various aspects of counsel's conduct during trial. As particular examples of counsel's claimed incompetence, he cites counsel's (1) allegedly inadequate cross-examination; (2) failure to object to the testimony of Lawrence P. Zamzok, Esq., Levine's former counsel; (3) failure to hire a handwriting expert; and (4) failure to challenge the in-court identification of Levine by several witnesses who had been shown photographic spreads.** The former two al-

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* The documents Levine did describe would have allegedly proved he worked for the International Tax Haven Review for *some* period of time. Neither the Government (Tr. 460), nor the witnesses, see p. 8, *supra* disputed that fact.

** Two other claims made by Levine are even more frivolous than those mentioned. Counsel's opening statement, while brief, did urge the jury to keep an open mind and to remember that the Government had the burden of proof. Under the circumstances, asking the jury to hold the Government to its burden of proof may have been the only strategy left counsel. Moreover, even waiver of an opening statement would not have demonstrated incompetence. *Rickenbacker* v. *Warden, supra,* 550 F.2d at 63; *United States ex rel Crispin* v. *Mancusi,* 448 F.2d 233, 237 (2d Cir.), *cert. denied,* 404 U.S. 967 (1971). Nor does counsel's failure to object to a single misstatement of fact during the prosecutor's summation demonstrate incompetence. *Rickenbacker* v. *Warden, supra,* 550 F.2d at 66.

legations lack support in either fact or law, while the latter two relate to tactical decisions made by counsel which, even if subsequently proven erroneous, are not indicative of incompetence. *See e.g. United States* v. *Garguilo, supra*, 324 F.2d at 796.

A brief review of counsel's cross-examination of the Government's witnesses, most of whom were entirely disinterested, reveals that counsel brought to the jury's attention whatever flaws, whether related to the facts or credibility, existed in the witness' testimony. Thus, witnesses who identified Levine or connected him to the various credit applications were questioned about their possible interest in the outcome of the case (Tomlinson, Mrs. Sweeney, Koppelman, McNally and Zamzok) and their opportunity to observe, and ability to remember, Levine (Tomlinson, Mrs. Sweeney, Caruana and Durso); witnesses who identified documents were questioned about their lack of personal knowledge of the facts and the defendant (Hanlon, Donald Sweeney, Lopez, Peller, Locker, Zell, Reale, Ruskiewicz and Mandigo); and witnesses who, in effect, testified that Levine did not live or stay at addresses contained in the applications were questioned on their ability to speak definitively about the activities of all tenants in their respective large buildings (Dotan, Constadt, Koch, and Caruana). Finally, the principals of the International Tax Haven Review (Comart, Koppelman and Stein) were cross-examined extensively with respect to their business relationship with each other and Levine, any grudges they might hold against Levine and inconsistencies in their stories. Faced with twenty-eight witnesses from various walks of life, each of whom testified about simple and straightforward matters not involving difficult feats of perception, memory, or articulation, counsel could not have done, and should not be expected to have done, any better.

Levine next asserts his counsel should have objected to the testimony of his former attorney, Lawrence P. Zamzok, on the ground that it violated the attorney-client privilege. Zamzok testified that Levine's bail conditions initially required him to personally appear at the magistrate once per week, but that the "sign-in" requirement was subsequently modified to once every three weeks. (Tr. 360-61). He confirmed that Levine was aware of those obligations. (Tr. 361). Mr. Zamzok's confirmation to Levine that he was required to report to the United States Magistrate once every three weeks was not in the nature of a privileged attorney-client communication. *United States* v. *Hall*, 346 F.2d 875, 882 (2d Cir.), *cert. denied*, 382 U.S. 910 (1965). *Accord*, *United States* v. *Freeman*, 519 F.2d 67, 68 (9th Cir. 1975). As such, counsel's failure to object to such testimony was entirely proper.*

Characterizing the testimony of the Government's handwriting expert as "crucial" (Br. at 9), Levine next cites his counsel's failure to hire his own handwriting expert as indicative of incompetency. However, the record clearly demonstrates that the testimony of Mr. McNally, the Government's expert, was largely cumulative. With respect to each count of the indictment, there was direct proof establishing that the defendant Levine was responsible for the credit application involved. Moreover, even the unskilled eye could compare the printing on the applications and conclude that they were all completed by the same person.** Indeed, counsel for the Government urged the jury to look at the applications and make the comparison for themselves. (Tr. 478, 480).

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* Mr. Hill did object when Zamzok was asked whether he had ever informed Levine that he had been relieved of his reporting obligations. (Tr. 361).

** The information on the applications and testimony of the witnesses other than McNally was more than sufficient for the jury to conclude that that person was Levine.

Mr. Hill's acquiescence in the obvious was simply not incompetent. Faced with the cumulative nature of McNally's testimony and the obvious common authorship of the credit applications, counsel could rationally have decided that engaging in a battle of experts would be a fruitless exercise and that the better tactic would be to briefly cross-examine the expert to establish his relationship to the Government and the limitations of handwriting analysis. That is precisely what counsel did.* (Tr. 430-31, 433, 434). That the strategy he adopted was unsuccessful is not an indication, let alone proof, of incompetence. *See, United States* v. *Garguilo, supra*, 324 F.2d at 797; *United States* v. *Currier, supra*, 405 F.2d at 1043.

Finally, Levine asserts the incompetence of his counsel is demonstrated by counsel's failure to move to suppress in-court identifications of Levine by witnesses who had seen photographic spreads during the investigation of the case. Counsel, however, did cross-examine each witness who identified Levine with respect to the witness' opportunity to observe Levine and ability to remember both Levine and other persons. In eliciting testimony from some of the witnesses about their prior photographic identifications, counsel attempted both to demonstrate the dangers of misidentification inherent in a photographic spread and to show that the in-court identifications were the product of exposure to the photographs instead of exposure to the defendant. The decision to challenge the identifications in that fashion was a rational tactical choice. *See, e.g., United States ex rel. Crispin* v. *Mancusi, supra*, 448 F.2d at 236-38.

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* That counsel actually considered, and rejected, the strategy of employing a defense handwriting expert is clear from the record (Tr. Oct. 1, 1976, pp. 8-9).

Moreover, assuming *arguendo* that the photographic spread exhibited to the witnesses was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification" * *Simmons* v. *United States*, 390 U.S. 377, 384 (1968), the facts developed at trial clearly established an independent basis for each identification and counsel's failure to make the now-suggested motion did not prejudice the defendant. *United States* v. *Yanishefsky*, *supra*, 500 F.2d at 1330-31; *United States ex rel. Crispin* v. *Mancusi*, *supra*, 448 F.2d at 238. *See, e.g. Neal* v. *Biggers*, 409 U.S. 188 (1972); *United States* v. *Wade*, 388 U.S. 218, 241-42 (1967); *United States ex rel. Pella* v. *Reid*, 527 F.2d 380, 382-83 (2d Cir. 1975); *United States* v. *Reid*, 517 F.2d 953, 966-67 (2d Cir. 1975); *United States* v. *Evans*, 484 F.2d 1178, 1186-87 (2d Cir. 1973); *United States ex rel. Gonzalez* v. *Zelker*, 477 F.2d 797 (2d Cir.), *cert. denied*, 414 U.S. 924 (1973); *United States ex rel. Phipps* v. *Follette*, 428 F.2d 912 (2d Cir.), *cert. denied*, 400 U.S. 908 (1970). *Cf. Massimo* v. *United States*, 463 F.2d 1171, 1173 (2d Cir. 1972), *cert. denied*, 409 U.S. 1117 (1973).

In the final analysis, given the overwhelming weight of the evidence against Levine, there was little that any lawyer could have done to forestall his conviction and counsel's representation of Levine was competent by any standard. Judge Stewart explicitly recognized that fact on two occasions. (Tr. 352, 560-61). This was truly a case in which

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* The photographic spread displayed to the various Government witnesses, which consisted of seven photographs, was marked for identification during the trial. (GX 32A-G). Only the photograph of Levine was received in evidence (GX 32C).

One witness, Caroline Tomlinson, was shown only four photographs. (GX 32A-D).

> "Determination of the effectiveness of counsel cannot be divorced from the factual situation with which he is confronted. When, as here, the prosecution has an overwhelming case based on documents and the testimony of disinterested witnesses, there is not too much the best defense attorney can do. If he simply puts the prosecution to its proof and argues its burden to convince the jury beyond a reasonable doubt, the defendant may think him lacking in aggressiveness, and surely will if conviction occurs. If he decides to flail around and raise a considerable amount of dust, with the inevitable risk that some may settle on his client, the defendant will blame him if the tactic fails, although in the rare event of success the client will rank him with leaders of the bar who have used such methods in some celebrated trials of the past."

United States v. *Katz*, 425 F.2d 928, 930 (2d Cir. 1970). Levine's present attitude toward his trial counsel, particularly when viewed in the context of his continued squabbles with his successive lawyers, merely reaffirms this Court's recent observation that "A convicted defendant is a dissatisfied client, and the very fact of his conviction will seem to him proof positive of his counsel's incompetence." *United States* v. *Joyce*, 542 F.2d 158, 160 (2d Cir. 1976), quoting from *United States* v. *Garguilo*, *supra*, 324 F.2d at 797.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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United States Attorney for the Southern District of New York, Attorney for the United States of America.

HOWARD W. GOLDSTEIN,
FREDERICK T. DAVIS,
Assistant United States Attorneys, Of Counsel.

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Form 280 A - Affidavit of Service by mail

AFFIDAVIT OF MAILING

State of New York)
County of New York)

HOWARD W. GOLDSTEIN being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 26th day of May, 1977 he served 2 copies of the within Brief For the U.S.A. 76-1579 by placing the same in a properly postpaid franked envelope addressed:

Henry Putzel III, Esq.
140 West 62nd Street
New York, New York 10023

And deponent further says that he sealed the said envelope and placed the same in the mail box drop for mailing in the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Howard W. Goldstein

Sworn to before me this

26th day of May, 1977

Alma Hanson

ALMA HANSON
NOTARY PUBLIC, State of New York
No. 24-6763450 Qualified in Kings Co.
Commission Expires March 30, 1978